No. , Original

Supreme Court of the United States

OCTOBER TERM, 1953

STATE OF ALABAMA, *Complainant*,

v.

STATE OF TEXAS; STATE OF LOUISIANA; STATE OF FLORIDA; STATE OF CALIFORNIA; GEORGE M. HUMPHREY; DOUGLAS McKAY; ROBERT B. ANDERSON; IVY BAKER PRIEST, *Defendants*.

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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only assert that the act complained of have an adverse effect on the health or economic welfare of a substantial number of its citizens. When there is injury to the health and welfare of a substantial number of its citizens, the state itself has sustained an injury which is sufficient to sustain a suit. See *Pennsylvania* v. *West Virginia*, *supra*, at 592.

The case at bar meets these requirements. While the acts complained of would not take place in Alabama, they would, unless restrained by this Court, have a decidedly adverse effect, in Alabama, on the economic welfare of a substantial number of the citizens of Alabama. In the first place, a substantial number of Alabama's citizens earn their livelihood from the fishing industry carried on in the Gulf of Mexico. The number of citizens of Alabama who are wholly or partly dependent on this industry for their livelihood runs into the thousands and the gross revenue from the industry in Alabama approximates $15,000,000 a year. Fishing carried on in the areas within nine miles from the coasts of Texas, Louisiana and Florida, described in paragraphs XII, XV and XVII of the Complaint plays an essential role in the maintenance of Alabama's fishing industry. Yet acting under the color of Public Law 31, the States of Texas, Louisiana and Florida are asserting not only the right to exercise control over this fishing out to nine nautical miles from their coasts but also the ownership of the fish and other natural resources in this area—an assertion which carries with it the right to discriminate against Alabama fishermen and to exclude them altogether.[11] Such action would

[11] Section 2(e) of Public Law 31 defines "natural resources" as including "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and

have a decidedly adverse effect upon the economic welfare of a substantial number of Alabama citizens.

In the second place, there is held, either by California or by the individual defendants or subject to their control, a sum of over $62,000,000. This sum consists of rents and royalties derived from leases or licenses to extract the natural resources described in paragraphs IX, X and XIII of the Complaint, *after* this Court had held that these natural resources were subject to the paramount jurisdiction and control of the Federal Government, and that the royalties from the development of these natural resources belong to the Federal Government, to be held in trust for all the people of the United States.[12] Yet unless restrained by this Court, the individual defendants will give these sums solely to three states, the defendants California, Texas and Louisiana.

In the past, Congress has carried out its trusteeship in expending Federal funds for the benefit of all the people of the United States in various ways. But under any formula which the Congress could work out *if it recognized this trusteeship which the Constitution*

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plant life". Section 3(a) of Public Law 31 provides that "title to and ownership of" the "natural resources" beneath the boundaries of the states shall be in the states. The state statutes by which the defendant states of Texas, Louisiana and Florida purport to extend their boundaries nine miles, or further, into the Gulf of Mexico, are set forth in Appendix C. At the very least, the effect of these statutes, together with statutes regulating fishing within their "boundaries," cited p. 5, *supra*, is to subject Alabama citizens to the requirement of paying license fees to these three defendant states for the privilege of fishing on the high seas.

[12] "The Government . . . holds its interest here as elsewhere in trust for all the people. . . ." (U.S. v. California, 332 U.S. 19, 40 (1947).

imposes upon it, the citizens of Alabama would obtain some benefit from this fund.[18] Nor does this interest of the citizens of the State of Alabama depend on the mere expectancy that the Congress *might* decide to make sums of this magnitude available to the states. Congress has already made that decision. It has already attempted to make this fund available to the states, but has tried to limit the states which can share in this fund to the States of California, Texas and Louisiana. It can therefore be seen that distribution of this fund solely for the benefit of these three states would have a substantial adverse effect, in Alabama, upon the economic welfare of the citizens of Alabama.

Finally, Alabama and its citizens have a similar equitable interest in the vast sums to be derived from the continued and ever-increasing development of the natural resources described in paragraphs IX, X, XIII and XVI of the Complaint. The value of these natural resources is at least fifty billion dollars. These natural resources have been declared by this Court to be under the paramount jurisdiction and control of the Federal Government. This Court has further declared that this paramount jurisdiction and control carries with it the right to develop these resources and to derive royalties and other revenues from them, revenues which the Federal Government must hold for all the people of the

[18] Alabama is one out of forty-eight states (2.08%); Alabama, according to the 1960 census, had a population of 3,061,743 out of a total national population of 150,697,361 (2.40%); Alabama has 2.52% of the national total of enrolled school children of the ages between 5 and 17. On any theory therefore, something between two per cent ($1,256,000) and two and a half per cent ($1,570,000) would appear to be a reasonable estimate of the interest of the citizens of Alabama in this fund.

United States. Alabama does not maintain that it is able to show with mathematical particularity the precise value of its equitable interest in these natural resources and the revenues to be derived from them, nor is Alabama required so to show. In view of the immense value of the natural resources involved in this controversy, according to any estimate, Alabama's interest is clearly substantial. Moreover, it is clear that Alabama will be completely and finally denied *any* interest in these natural resources and revenues unless the defendants, both state and individual, are enjoined from taking the action which they propose to take under color of Public Law 31.

The fact that the realization of economic benefits to Alabama or its citizens (which Alabama seeks to protect) may conceivably depend upon subsequent action of the Congress does not deprive Alabama of its standing to sue. The interest of Alabama is much more immediate and direct than that of the then former Secretary of the Interior in the case of *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153 (1953). In that case the Secretary of the Interior was held to have standing to appeal from an order of the Federal Power Commission granting a license to a privately-owned utility company to construct a hydro-electric facility at Roanoke Rapids, North Carolina. The sole official interest of the Secretary of the Interior was his statutory duty to act as marketing agent of surplus power which was generated at projects under the control of the Department of the Army and which, in the opinion of the Secretary of the Army, was not required for the operation of the project. This marketing function could come into existence only if Congress, at some future date, were to authorize the construction of a

dam, appropriate the money for such construction, and a dam were to be constructed at which power was generated which an independent Federal official decided his Department did not need. Yet the Court was unanimous in its opinion that Secretary Chapman had standing to question the order of the Federal Power Commission in the Courts.

In concluding the discussion of Alabama's standing to sue, it may be helpful to deal with the questions which may be raised as a result of the decision of this Court in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923). In that case the State of Massachusetts attempted to enjoin the Secretary of the Treasury and other Federal officials from putting in effect the Maternity Act of 1921. This Act provided for an appropriation of funds from the general funds of the Treasury, to be apportioned among those states that would cooperate with the Federal Government in a program of reducing maternal and infant mortality. The Court held that Massachusetts had no standing to attack the constitutionality of the legislation.

Insofar as Alabama is suing to protect its sovereign interests, as opposed to its interests as quasi-sovereign and *parens patriae*, it is not necessary even to consider *Massachusetts* v. *Mellon*. There has never been any question but that a state is entitled to sue to protect its interests as sovereign, even though those sovereign interests are threatened with invasion under color of an Act of Congress.[14]

An analysis of the Court's opinion in *Massachusetts* v. *Mellon* makes it clear that the Court was not impressed by the argument that the action brought by

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[14] See Kansas v. Colorado, 206 U.S. 46, 85-92 (1907).

Massachusetts was necessary to prevent a threatened detriment to the citizens of Massachusetts by the expenditure of the general funds of the Treasury to which the citizens of Massachusetts (along with those of the other forty-seven states) had contributed by paying Federal taxes. This is clear, since, under the Maternity Act, Massachusetts was offered the same chance to obtain the benefits of the Act for its citizens as were the other forty-seven states. There was no real question raised as to the fairness of the proposed method of apportionment. Therefore, the Court, while it expressly disclaimed holding that a state could never attack the constitutionality of a Federal statute as *parens patriae* for its citizens,[15] held that Massachusetts had not shown that it was entitled to do so in that proceeding.

In the view of the Court, the real claim of Massachusetts was that the offer of the Federal Government to cooperate in the field of maternity aid in Massachusetts was an invasion of the powers reserved to Massachusetts under the Tenth Amendment. It was apparent on the face of the statute, however, that the Act would be applied in Massachusetts only if Massachusetts agreed to its being applied. The Court felt, therefore, that it was being required to answer a mere abstract political question. As the Court itself stated the question: (262 U.S. at 483)

> "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that

[15] "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here." 262 U.S. at 485.

> Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power."

It is thus clear that the Court in *Massachusetts* v. *Mellon* did not hold that Massachusetts could not assert its interests if an Act of Congress were involved. It rather held that the interests which Massachusetts asserted were not in fact threatened with invasion.

Alabama asserts a real sovereign interest and a substantial financial interest in the outcome of this controversy. This interest is in real jeopardy by the threatened action of the defendants. Unlike Massachusetts in *Massachusetts* v. *Mellon*, it is offered no option by which it can protect its interests; its interests can be protected only by action of this Court. Alabama is not attempting to raise any abstract question of the respective spheres of political power between Alabama and the Federal Government. Alabama claims that Public Law 31 and the action proposed to be taken under color of it, is in violation of specific constitutional provisions—constitutional provisions limiting the power of the Federal Government, limiting the power of the defendant states, and granting definite interests to Alabama.

It is also respectfully suggested that an important factor in the decision of this Court in *Massachusetts* v. *Mellon* was the far-reaching implication of an opposite decision in that case. The Court could not have failed to have been aware that a decision that Massachusetts

had standing to contest the constitutionality of the Maternity Act would have made it possible in the future for states to question before the Court every item of Federal expenditures. This would be so, moreover, even though the interest of the State in attacking the expenditures was not to protect a legitimate economic or financial interest, but was primarily political. Such a decision would place before the Court a never-ending stream of cases on what had not previously been considered justiciable controversies.

Here there is no question that Alabama's interest in attacking the constitutionality of this statute is economic. The gravity of the effect of the statute on Alabama has already been shown. Moreover, a decision recognizing the propriety of Alabama's interest will not have any of the far-reaching effects which were feared by the Court in *Massachusetts* v. *Mellon*. Here there is no question but that the fundamental dispute which lies at the root of this controversy is a judicial one. This Court, it is submitted, has already passed on the justiciability of the present controversy in *United States* v. *California*, 332 U.S. 19, 24-25 (1947):

> "The point of difference is as to who owns, or has paramount rights in and power over several thousand square miles of land under the ocean off the coast of California. The difference involves the conflicting claims of federal and state officials as to which government, state or federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land, much of which has already been, and more of which is about to be, taken by or under authority of the state. Such concrete conflicts as these constitute a controversy in the classic legal sense, and are the very kind of differences which can only be

settled by agreement, arbitration, force, or judicial action."

The case at bar is merely a continuation of the same controversy. The context is altered, but the basic question, as in the *California* case, is whether the natural resources involved in this suit are to be held for the exclusive benefit of the defendant states or for the benefit of all the states and the citizens thereof. Alabama, as quasi-sovereign and *parens patriae*, has standing to sue to protect its interests and those of its citizens, in these resources.

A further analysis of *Georgia* v. *Pennsylvania Railroad, supra*, indicates the strength of Alabama's case when suing as *parens patriae*. There the Court permitted the State of Georgia to bring a civil action for an injunction under the anti-trust laws because Georgia alleged that violations of the anti-trust laws were having an adverse economic effect upon a substantial number of its citizens. The opposing argument was made that the Federal Government alone could act as *parens patriae* for the citizens of Georgia, under the anti-trust laws, just as it is anticipated that it will be argued in this case that the Federal Government alone has the right to act as *parens patriae* for the citizens of Alabama. In fact, the argument would appear to have been stronger in *Georgia* v. *Pennsylvania Railroad* than in this case, both because the statutory scheme of the anti-trust laws did provide for suits of that character by the Federal Government, and because the suit was one by a state against citizens of another state, where the jurisdiction of this Court is merely discretionary. Yet the argument was rejected and Georgia permitted to sue as *parens patriae*.

This Court has allowed a state, suing as quasi-sovereign, to attack the constitutionality of a Federal law. In *Missouri* v. *Holland*, 252 U.S. 416 (1920), the Court recognized the standing of the State of Missouri to attack the enforcement, in Missouri, of a migratory bird statute, which was claimed to be invalid as interfering with the rights reserved to the states by the Tenth Amendment. The Court, speaking through Mr. Justice Holmes, stated that the bill of complaint was "a reasonable and proper means to assert the alleged quasi sovereign rights of a State." 252 U.S. at 431.

Although this case was decided before *Massachusetts* v. *Mellon*, its authority was reaffirmed by the decision of this Court in *Hopkins Savings Association* v. *Cleary*, 296 U.S. 315 (1935). In that case the Court held that a state had standing, as quasi-sovereign and *parens patriae*, to question the constitutionality of a Federal act claimed to authorize the conversion of building and loan associations, organized under state law, to Federal associations, without obtaining the permission of the state. The Court cited *Missouri* v. *Holland* with approval. It further observed that the state had a duty to protect the "non-vocal" creditors and investors in the state association and that it could vindicate this duty by suit. It did not consider it a bar that the action complained of was taken under color of a Federal statute. The injury threatened to the "non-vocal" creditors and investors was of a most general nature; and its extent was by no means clear. In the instant case Alabama's citizens are threatened with economic loss much more certain and immediate than the injury threatened to the "non-vocal" creditors and investors in the *Cleary* case. And the interest which Alabama is asserting is

not one which it is asserting against the Federal Government. It is asserting an interest as quasi-sovereign and *parens patriae* against other states, acting under color of Federal legislation, just as the state officials in *Hopkins Savings Association* v. *Cleary* were asserting claims on behalf of the citizens of the state against a corporation which was acting under color of Federal legislation. And the individual defendants in this case are not joined because they are asserting any rights on behalf of the Federal Government. They are joined only because of their proposed acquiescence and cooperation in the unlawful claims of the defendant states.[16]

II

PUBLIC LAW 31 IS NOT A VALID EXERCISE OF THE POWER OF CONGRESS TO DISPOSE OF PUBLIC LANDS OF THE UNITED STATES.

On three occasions this Court has held that the submerged lands and resources described in paragraphs IX, X, XIII, XVI and XXXI of the Complaint do not belong, and have never belonged, to defendant states; and that the United States has paramount rights and dominion over them. *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). The Court felt that this result was required by the constitutional system of the United States. Public Law 31 attempts to establish title in the defendant states to property and resources over which the United States has paramount rights and do-

[16] The grounds for distinction between this case and Massachusetts v. Mellon are applicable *a fortiori* to Florida v. Mellon, 273 U.S. 12 (1927).

minion, and over which these states have never had any title or paramount rights. The value of the assets involved is immense—estimated at fifty billion dollars, or more.

In the *California* case, the Court pointed out that any rights which existed in the area now in controversy were rights which existed only as the result of action taken by the Federal Government in the exercise of its power over foreign relations. (See 332 U.S. at 35-36). The defendant states had no part in the development of such rights. This followed from the fact, pointed out by this Court in *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936), that there was an "entire absence" of power in the states to deal with matters of this kind (see 299 U.S. at 317) and hence an entire absence of power on the part of the defendant states to establish rights to the lands and natural resources lying seaward of the ordinary low water mark off their coasts.

From this the Court deduced that the rights to these lands and natural resources were themselves rights held by the Federal Government, not by the coastal states. In the words of the Court:

> "And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use." (332 U.S. at 35)

In asserting "its rights under international law", the Federal Government is acting on behalf of all the United States. The United States cannot act solely on behalf of four defendant states. It cannot, as Public Law 31 purports to do, delegate to four defendant

states the right to develop assets which result solely from the assertion of *rights of the United States* under international law, and develop them solely for the benefit of its own citizens. The fruits of the conduct of the foreign relations of the United States must be available to all the United States.

The constitutional provision under which Congress purported to act in passing Public Law 31, is Article IV, Section 3, Clause 2 of the Constitution which provides that the Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." Alabama believes that arguments advanced show that something much more than property is involved. As this Court pointed out in the *California* case, the rights involved in this dispute were rights "transcending those of a mere property owner." (See 332 U.S. at 29). In the *Texas* case, moreover, this Court indicated that any property interests which existed were "so subordinated to the rights of sovereignty as to follow sovereignty." (See 339 U.S. at 719). Even assuming, however, that something akin to "property" in the ordinary sense is involved in this dispute, Public Law 31 is still an invalid attempt to exercise the power to dispose of property belonging to the United States. The power granted to the United States under this Article IV, Section 3, Clause 2 of the Constitution is one which must be exercised in a fiduciary capacity. Indeed, the opinion of the Court in *United States* v. *California*, 332 U.S. 19, 40 (1947), described the role of the United States with respect to the very interests now in controversy in the following terms:

"The Government . . . holds its interests here as elsewhere in trust for all the people . . ."

Although there may be room for divergent views as to the most desirable technique of discharging trust responsibilities, there is no question but that the trustee must act *as trustee for all beneficiaries.* It is hard to see how Public Law 31 can satisfy this basic requirement for the proper exercise of a trust. It purports to have "recognized" and "confirmed" "title to and ownership of" lands and natural resources in controversy in this proceeding in the defendant states, notwithstanding the fact that this Court has consistently held that neither title nor ownership to these lands or natural resources has ever been in the defendant states. Prior to the enactment of Public Law 31 these resources were unquestionably resources of the United States, valuable monetarily in the amount estimated at from fifty billion to three hundred billion dollars. Public Law 31, if applied as threatened by the defendants, would advance the fortunes of the four defendant states to the detriment of the other forty-four. This cannot be justified as a valid congressional exercise of a public trust for all the people. In fact, as will be shown in detail later in this portion of the argument, the legislative history of Public Law 31 shows that its framers, far from being concerned with exercising a trust for the benefit of all the people, were primarily, if not entirely, concerned with reversing the decisions of this Court which had held that these natural resources belonged to all the people rather than merely the defendant states alone.

An indication of the criteria which this Court applies in determining whether a particular disposition

of public property was a proper exercise of a public trust is contained in the decision of the Court in *Illinois Central R. Co.* v. *Illinois*, 146 U.S. 387 (1892). The holding in that case is strengthened by the fact that the disposition under review was a disposition by a state legislature rather than by the Congress. The Court may be expected to apply at least as strict criteria in the case of a congressional disposition, which is subject to a particular constitutional provision, as in the case of a state disposition, subject only to the Fourteenth Amendment.[17] In the *Illinois Central* case the Illinois legislature had granted to a railroad company submerged lands in the bed of Lake Michigan for a considerable distance into the lake. This Court held the grant invalid and hence revocable by a later Illinois legislature. The language of the opinion is so apt that extensive quotation seems appropriate (pp. 452 et seq.):

> "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be dis-

[17] Compare Helvering v. Davis, 301 U.S. 619, 640 (1937), with Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937).

posed of without any substantial impairment of the public interest in the lands and waters remaining. . . . A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

* * *

"Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. . . .

"Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. . . . (T)he power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company . . . would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated.

"We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its

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REPLY BRIEF FOR COMPLAINT

STATEMENT

In this brief Alabama replies to four types of arguments made by some or all of the defendants as reasons why this Court should not hear Alabama's case. First, the defendants argue that there is no threatened injury and hence no reason for exercising the jurisdiction of this Court. Second, all of the defendants deny Alabama's standing to object to Public Law 31, even if it is unconstitutional. Third, the individual defendants urge that Public Law 31 is constitutional. Fourth, all the defendants argue that the United States is an indispensable party.

ARGUMENT

I. THE THREATENED INJURY SOUGHT TO BE AVERTED IS IMMEDIATE.

Alabama has brought this suit to prevent the defendant states and the individual defendants from taking action which would inflict irreparable injury on Alabama and its citizens. These actions include the assertion by the defendant states of ownership, exclusive jurisdiction and control by the defendant states of the natural resources of the seabed off their shores. In the case of three defendants, Texas, Florida and Louisiana, these assertions include the entire area within nine nautical miles off their shores.[1] In the case of California these assertions include the entire area within three miles off its shores.[2] The individual defendants are acquiescing in these claims.[3] The defendants Texas, Louisiana and Florida are also asserting territorial jurisdiction with respect to that portion of the high seas which is between three and nine miles off their shores.[4] These states have statutes regulating commercial fishing within their territorial boundaries and they are unlawfully applying these statutes to this portion of the high seas, thus requiring citizens of Alabama to pay license fees to these states for the privilege of fishing on the high seas.[5]

Alabama has alleged these facts in its Complaint. Alabama is prepared to prove these facts. These are the facts which, Alabama submits, require the exercise

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[1] Complaint, Paragraphs XXII, XXIII, XXV, XXVI, XXVIII, XXIX.

[2] Complaint, Paragraph XXI.

[3] Complaint, Paragraph XXXIII.

[4] Complaint, Paragraphs XXII, XXV, XXVIII.

[5] Complaint, Paragraphs XXIV, XXVII, XXIX.

of jurisdiction by this Court to prevent irreparable injury.

The defendants have confused the issue by attempting, in effect, to deny the truth of certain of these allegations of fact in Alabama's Complaint while at the same time arguing that the Complaint should not be heard. The defendants are thereby attempting to avoid the responsibility of putting those facts in issue so that Alabama may have an opportunity to prove them. Thus the briefs of both Louisiana and Florida attempt to deny that those states are claiming territorial jurisdiction over the portion of the Gulf of Mexico from three to nine miles from their shores.[6] The brief of the individual defendants attempts to question whether the defendant states of Texas, Louisiana and Florida are claiming territorial jurisdiction over this portion of the Gulf of Mexico from three to nine miles from their shores and, as a result, ownership and exclusive jurisdiction and control of the natural resources of the seabed in the area, and that the individual defendants will acquiesce in these claims if not restrained by this Court.[7] The three defendant states of Texas, Louisiana and Florida attempt to cast doubt on the existence of licensing statutes for commercial fishermen which are applicable in this three to nine mile belt and on the intent of the defendants Texas, Louisiana and Florida to enforce them.[8]

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[6] Objections of Louisiana, p. 15; Objections of California and Florida, p. 10.

[7] Opposition of Defendants Humphrey, et al., pp. 31-32.

[8] Objections of Texas, p. 16; Objections of Louisiana, p. 20; Objections of California and Florida, p. 30. The statutes by which these states regulate fishing within their territorial boundaries are cited on page 5 of Alabama's Brief in Support of Motion for Leave to File Complaint.

It is elementary that in entertaining a motion to dismiss a complaint (which is what the defendants' briefs amount to) a court must assume that all well pleaded facts set forth in the complaint are true. The individual defendants, however, attempt to avoid the application of this rule by characterizing these allegations as mere predictions without the statement of any facts as a foundation.[9] But there is no rule that evidence must be pleaded. In attempting to devise a rule that an allegation of what the defendants will do, if not restrained by the Court, is not properly pleaded because it is a prediction, the defendants are striking a blow at the entire preventive jurisdiction of courts of equity.

Alabama's Complaint alleges facts—many of them open and notorious—which show that Alabama and its citizens are faced with an immediate threat of irreparable injury. Alabama is prepared to prove these allegations when the defendants have properly placed them in issue. Alabama's Complaint cannot be dismissed on the basis of mere denials of fact. Therefore the further consideration of the Motion for Leave to File a Complaint must be on the basis of the facts as set forth in the Complaint.

II. The State of Alabama has standing to sue.

A. Alabama has standing as a sovereign state.

The State of Alabama is suing both as sovereign and as quasi-sovereign and *parens patriae*. As sovereign the State of Alabama is suing to protect its right to be treated on an equal footing with all the defendant states with respect to interests in the natural resources

[9] Opposition of Defendants Humphrey, et al., p. 32, fn. 10.

involved in this proceeding, interests which have been held to be an essential part of sovereignty. As sovereign, the State of Alabama is also suing to protect its right to be treated on an equal footing with the defendants Texas, Louisiana and Florida with respect to the width of the belt of territorial waters off its shores.

The various defendants argue that the equal footing clause relates only to the political rights of sovereignty of the state, not to its property rights or boundaries. They further argue that there may be certain disparities between states as to the ownership of upland properties within their boundaries and that these disparities are not prohibited by the equal footing clause. This argument, however, overlooks the distinction between upland properties and properties beneath navigable waters which has consistently been made both by the Congress in admitting new states to the Union and by the courts.

The original states owned the natural resources of the subsoil of navigable inland waters within their boundaries. *Martin* v. *Waddell*, 16 Pet. 366 (1842). The states which entered the Union subsequently entered on an equal footing with the original states and were entitled to similar property rights.[10]

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[10] The fact that the Congress and the courts have both included property interests in submerged lands within the equal footing clause makes it unnecessary to decide what the result would be if the Congress in admitting a new state attempted to give it greater or less rights to submerged lands. The Court in Pollard's Lessee v. Hagan, 3 How. 212, 229 (1845), however, has stated: "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."

Pollard's Lessee v. *Hagan*, 3 How. 212 (1845). It is thus clear that the Court has held that property interests in the natural resources of the submerged lands under inland waters are covered by the equal footing clause. *United States* v. *California*, 332 U.S. 19 (1947), *United States* v. *Texas*, 339 U.S. 707 (1950) and *United States* v. *Louisiana*, 339 U.S. 699 (1950), make it clear that the equal footing clause applies to the natural resources underlying the marginal seas off their shores. As this Court pointed out in the *California* case, the acquisition of this three mile belt was accomplished by the National Government. See 332 U.S. at 34. For this reason, when additional states were admitted to the Union on an equal footing with the original states, they were no more entitled to the ownership of the natural resources underlying the marginal seas off their shores than were the original states.

Any doubt on this point was removed by the decision of the Court in the *Texas* case. There the Court, speaking of the interests in the submerged lands off the coast of Texas, described the constitutional protection afforded by the equal footing clause in the following manner:

> "The same result must be reached here if 'equal footing' with the various States is to be achieved. unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States (*United States* v. *California*, *supra*, pp. 31-32) nor California nor Louisiana enjoys such an advantage. The 'equal footing' clause prevents extension of the sover-

> eignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee* v. *Hagan, supra*) which would produce inequality among the States. For equality of States means that they are not 'less or greater, or different in dignity or power.' See *Coyle* v. *Smith*, 221 U.S. 559, 566. There is no need to take evidence to establish that meaning of 'equal footing.'" (339 U.S. at 719-20.)

Thus in the *Texas* case this Court held that the property interests in the resources of the marginal sea were so closely related to political sovereignty as to be united with it. It therefore held that the property interests in the resources of the marginal sea were included in that sovereignty which was protected by the equal footing clause. *A fortiori* the width of the belt of territorial waters in which such property interests may be held is covered.

The *Texas* case, and the cases that preceded it, supply the answer to the argument made by the defendants that Alabama has no standing to sue because it is not seeking anything for itself. The Acts of Congress admitting Alabama and the other states to the Union on an equal footing with the original states create a compact between the forty-eight states of the Union. Under this compact the natural resources under the marginal seas are to be the exclusive property of no state, but are to be developed for the benefit of all alike. Alabama's rights under this compact are violated if these natural resources are made available exclusively to the defendant states and it is this violation which it is suing to prevent. In addition, Alabama has a right to equal treatment with the defendant

states with respect to the width of the belt of territorial waters off its shores.

These are the rights which Alabama is suing to vindicate, in the manner contemplated by the Constitution, by an original suit in this Court. In this connection Alabama refers the Court to the discussion of the function of the original jurisdiction of this Court contained on pages 18-24 of its Brief. There it was set forth how the original jurisdiction of this Court was intended to provide a substitute for the means of settling disputes normally available to national states which the states gave up when they joined the Union. None of the objections filed by the defendants contained an answer to the argument that under this rule Alabama is entitled to sue in this Court to set aside actions which would deny its guarantee of equal footing. The defendants seem to suggest that the only course open to Alabama is to follow the defendants in their illegal course of conduct. Such a suggestion is a perversion of the historic role of this Court in suits between states. If accepted, it would substitute unilateral action and self-help for the orderly processes of justice.

B. ALABAMA HAS STANDING AS QUASI-SOVEREIGN AND PARENS PATRIAE.

Alabama is also suing as quasi-sovereign and *parens patriae* to attack the validity of measures which will have an adverse effect on the economic welfare of a substantial number of her citizens. These include measures which the defendant states of Texas, Louisiana and Florida are taking under color of Public Law 31 by which they assert the right to regulate Alabama citizens fishing on the high seas in the area between

three to nine miles off the coast of these defendant states. These also include measures by which all the defendant states, with the acquiescence and support of the individual defendants, propose to divert the royalties obtained from the development of the natural resources involved in this proceeding to the sole benefit of their own citizens, to the exclusion of the citizens of Alabama.

The defendants all argue that Alabama has no standing to sue as quasi-sovereign or as *parens patriae* because the Federal Government rather than Alabama acts as the *parens patriae* of Alabama citizens with respect to the interests involved in this controversy. The defendants base this argument on *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923). The interest which Massachusetts sought to represent as *parens patriae* was the interest of Massachusetts citizens as Federal taxpayers. Massachusetts, as *parens patriae*, was attempting to contest an expenditure of Federal funds which, it argued, came in part from taxes paid by Massachusetts taxpayers but for which it was also argued, they would receive no benefit. The Court held that the relationship between these citizens and the Federal Government with respect to the payment of Federal taxes was not a matter with respect to which Massachusetts could act as *parens patriae*.

The interests of Alabama citizens which Alabama seeks to protect as *parens patriae* are quite different from those involved in *Massachusetts* v. *Mellon*. They are not rights which grow solely from their status as citizens of the United States. The right of Alabama citizens not to be excluded from the benefits of the natural resources involved, in this proceeding by the diversion of the royalties from these resources to the

sole benefit of the citizens of the defendant states is not a right which flows solely from the relationship of these Alabama citizens and the Federal Government. This is a right which flows from the compact between Alabama and the other forty-seven states, including the defendant states, that each of them should stand on an equal footing with respect to the resources of the marginal sea. The right of Alabama citizens to fish on the high seas in the area from three to nine miles off the coasts of Texas, Louisiana and Florida is not a right which flows solely from the relationship of these Alabama citizens in the Federal Government. This is a right which flows from the relationship between Alabama and the defendant states with respect to the width of the belt of territorial waters off their shores. It is a right which Alabama citizens have because they are Alabama citizens. If they were citizens of Texas, Louisiana or Florida, their situation would be quite different. *Skiriotes* v. *Florida*, 313 U.S. 69 (1941).

Alabama, moreover, is not asserting any interest as quasi-sovereign and *parens patriae* against the Federal Government. Alabama, as quasi-sovereign and *parens patriae* is asserting an interest against the defendant states. As pointed out in its original Brief, Alabama has joined the individual defendants in this suit because of their proposed acquiescence and cooperation in the unlawful claims of the defendants in any rights which they are claiming on behalf of the Federal Government.

It is thus clear that if any government is to act as *parens patriae* to assert the rights here in question on behalf of Alabama citizens, it must be the Government of the State of Alabama, not the Federal Government. The defendants attempt to answer this by urging the

adoption of a sweeping rule that no state, suing as *parens patriae*, can ever attack the constitutionality of a Federal statute. This argument should be quickly rejected.

In the first place the Court, in *Massachusetts* v. *Mellon*, expressly disavowed such an intention by its statement: "We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here." (262 U.S. at 485.)

In the second place, this Court has recognized the standing of a state suing as quasi-sovereign and as *parens patriae* to contest the constitutionality of a Federal statute. It did so in *Missouri* v. *Holland*, 252 U.S. 416 (1920), and it did so in *Hopkins Savings Association* v. *Cleary*, 296 U.S. 315 (1935), a case in which *Missouri* v. *Holland* was cited with approval. That case involved the constitutionality of a Federal statute which authorized the conversion of state building and loan associations, organized under state law, to Federal associations. The state brought suit to question the constitutionality of the statute as quasi-sovereign and *parens patriae*, claiming that it was necessary for it to do so to protect "non-vocal" creditors of the state associations who, it was contended, might find themselves in a worse position after the conversion than before. There is no question but that the case involved a suit by a state, as quasi-sovereign and *parens patriae*, for the purpose of attacking the constitutionality of a Federal statute. Yet this Court held that there was standing to sue. The cases which were cited to support this proposition included *Missouri* v. *Holland*, *Pennsylvania* v. *West Virginia*, 262

U.S. 553 (1923), and *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907), all leading cases as to the authority of a state to bring suit as quasi-sovereign and *parens patriae*.

Finally, any such rule as that urged by the defendants would be inconsistent with the principles which have been followed since *Marbury* v. *Madison*, 1 Cranch 137 (1803), under which this Court, in considering controversies before it, considers all the law before it, including the Constitution of the United States. The principles of judicial review which have been followed since that case make it clear that if a state, in the course of asserting an interest as quasi-sovereign or as *parens patriae* which it is proper for it to assert, finds that a Federal statute is involved whose constitutionality is in question, it can challenge it and the Court will deal with it.

III. Alabama's Complaint States a Cause of Action.

The defendant states have limited the arguments in their objections to Alabama's Motion to attacks on Alabama's standing to question the constitutionality of Public Law 31 and action taken under it. In their objections to Alabama's Motion they have not directly challenged Alabama's arguments that Public Law 31, and acts taken under it, are in violation of constitutional guarantees. The individual defendants, however, have advanced a separate ground for denying Alabama leave to file its Complaint, the argument that Public Law 31 and certain action to be taken under it by the various defendants are constitutional.

Two principal arguments are advanced by the individual defendants. The first relates to all the natural resources involved in this suit. The second relates to

the natural resources between three and nine miles off the shores of the defendants Texas, Louisiana and Florida. The argument of the defendants concerning these resources amounts merely to an assertion that the guarantee of equal footing does not include equality as to the width of the marginal sea. This is an argument which has already been dealt with in Alabama's original Brief and in the portion of this reply brief which relates to standing to sue.

With respect to all the natural resources involved in this suit, including those within three miles off the shores of the defendant states, the individual defendants argue that Public Law 31 is a disposition by Congress of Federal property, and that the power of Congress to dispose of Federal property is unlimited and not subject to judicial review. Thus the Opposition of Defendants Humphrey, *et al.* states (p. 22): "this Court has repeatedly recognized that the interest of the United States in its property is subject to the Government's *absolute* power of disposal." (Emphasis supplied.) Such an assertion of absolute and unqualified power finds no recent parallel in history, with the possible exception of the claims of an unlimited presidential power made by the Government and rejected by this Court in the recent *Steel Seizure* case, *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). If accepted it would make of the property clause a reservoir of power far greater than that given any branch of the Government by any other provision of the Constitution. If accepted, it would undermine our constitutional system of checks and balances, of which judicial review is an integral part. An attempt is made to back up this statement by a hyper-literal reading of a series of dicta of this Court, all of which,

when read in context, amount to no more than the statement that the congressional power to dispose of property includes the authority of Congress to make necessary and proper regulations to see that disposition is carried out in a manner which protects the public interest and is consistent with the general principles of our constitutional system. This assertion of an unlimited and unreviewable power is made notwithstanding the fact that this Court, in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), has decided the question whether a particular disposition of Federal property was authorized by the property clause and has set forth the following criteria which should guide such a review: (297 U.S. at 338)

> "The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, *it must be one adopted in the public interest as distinguished from private or personal ends*, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States. . . ." (Emphasis supplied.)

Under the decision of this Court in the *Ashwander* case, therefore, action by the Congress under the property clause is not absolute. It is subject to review by the Court according to the criteria which were set forth and applied by the Court in the *Ashwander* case itself. In the closely analagous case of *Illinois Central R. Co.* v. *Illinois*, 146 U.S. 387 (1892), the Court held that a particular disposition of state property by a

state legislature was revocable as an invalid exercise of a public trust. The individual defendants attempt to distinguish this case on three grounds. First, they state that it involves merely a question of state law, without any constitutional significance.[11] Second, they argue that the *Illinois Central* case involved a grant to a private corporation while the present case involves a grant to certain states.[12] Third, they argue that the *Illinois Central* case goes merely to the point of whether Public Law 31 is sufficiently defective so that a later Congress may revoke it on the theory that no vested rights could accrue under it, not to the point of whether it is void on its face.[13]

The individual defendants base the first of their arguments—that the *Illinois Central* case only decided a question of state law—upon the following statement: "The conclusion reached in *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387, 'was necessarily a statement of Illinois law' (*Appleby* v. *City of New York*, 271 U.S. 364, 395), '. . .'"[14] The quotation of this phrase from *Appleby* v. *City of New York* would have been more enlightening had it included the entire sentence of which it was a part. The entire sentence reads as follows: (271 U.S. at 395.)

> "That case (*Illinois Central* case) arose in the Circuit Court of the United States, and the conclusion reached was necessarily a statement of Illinois law, *but the general principle and the exception have been recognized the country over* and

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[11] Opposition of Defendants Humphrey, et al., pp. 25-26.

[12] Id., pp. 28-30.

[13] Id., pp. 26-27.

[14] Opposition of Defendants Humphrey, et al., p. 26.

have been approved in several cases in the State of New York." (Parenthesis and emphasis supplied.)

The failure of *Appleby* v. *City of New York* to support the position of the individual defendants is shown by the description by the Court in that case of the decision in the *Illinois Central* case, a description which supports the weight which Alabama has placed on the *Illinois Central* case. In *Appleby* v. *City of New York* the Court stated that in the *Illinois Central* case:

> ". . . the validity of a grant by the Illinois legislature to the Illinois Central Railroad Company of more than 1,000 acres, in the harbor of Chicago in Lake Michigan, was under consideration. It was more than three times the area of the outer harbor, and not only included all that harbor, but embraced the adjoining submerged lands which would in all probability be thereafter included in the harbor. It was held that it was not conceivable that a legislature could divest the State of this absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power, and that a grant of such right was invalid. . . ." (271 U.S. at 393.)

The decision in the *Illinois Central* case was therefore not merely a decision on Illinois law. It was based on a general principle of constitutional law, applicable to state and Federal governments alike.

The second argument by which the individual defendants attempt to distinguish the *Illinois Central*

case — that it involved a private corporation — is equally unpersuasive. A state is no more entitled to benefit from a breach of trust than is a private corporation. In the *Illinois Central* case the property was held in trust for the people of Illinois. The transfer of the property to the Illinois Central Railroad was held a breach of that trust because it did not adequately take into account the interests of *all* the people of the State of Illinois. In the present case the United States holds its paramount rights in the lands and resources of the marginal seas which are the subject of this suit in trust for *all* the people of the United States. See *United States* v. *California*, 332 U.S. 19, 40 (1947). Yet Public Law 31 seeks to dispose of these lands and resources solely for the benefit of the four defendant states, to the exclusion of the other states of the Union and their citizens, including Alabama and its citizens.

The statement of the chief sponsors of this legislation, as well as the circumstances which gave rise to it, was not an exercise of a trust for the benefit of all the people of the United States. Indeed, the very purpose of Public Law 31 was to nullify the principle established by this Court in the *California*, *Louisiana* and *Texas* cases, according to which the submerged lands and resources here involved were held to be subject to a trust for the benefit of the United States. A trustee is entitled to great latitude in exercising his discretion in carrying out a trust. He is entitled to no latitude at all when he refuses to recognize its existence.

Little consideration need be given to the third argument by which the Government attempts to distinguish the *Illinois Central* case—that it merely relates to the problem of whether Public Law 31 is voidable by some

subsequent Congress, not to whether it is void. Clearly had the original transfer involved in the *Illinois Central* case not been void, the attempt to revoke them would have been a violation of the contract clause.

IV. The United States is not an indispensable party.

Briefs submitted by three of the defendants argue that the United States is an indispensable party to the suit, which must therefore fail, since the United States has not consented to be sued.[15] This point is given rather different meanings by the respective defendants' papers.

California, Florida and Texas argue, in the main, that the United States is an indispensable party because Alabama seeks an adjudication of rights and responsibilities of the Federal Government under Public Law 31. The opposition of the individual defendants asserts that the relief prayed for against these individuals is actually required of the sovereign, affecting its property, thus raising the same issue.

Alabama's Complaint and prayer are explicit that no relief is sought that requires any affirmative action of the Federal Government or its officers with respect to the funds, lands and natural resources involved in the suit. What is sought with respect to the lands and natural resources is an injunction against the defendant states to stop assertions of "ownership, full dominion and power over, and the exclusive jurisdiction and control over" these resources,[16] and an injunction against the individuals in effect to restrain

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[15] Opposition of Defendants Humphrey, et al., p. 33; Objections of California and Florida, p. 34; Objections of Texas, p. 18.

[16] See paragraphs 5 and 7 of Alabama's prayer for relief.

their turning over control of these resources to the defendant states.[17] With respect to the accrued rents and royalties in the custody of the individuals, the prayer asks that the individuals be enjoined from paying over the funds to the defendant states, an act which would deprive Alabama and its citizens of any possible benefit from these funds.[18]

No burdens upon the machinery of government are involved in the prayer for relief. No adjudication of the Government's property interests adverse to the Federal Government are prayed for. The nature of this interest has, in fact, thrice been adjudicated in *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950). Alabama seeks to restrain interferences with the equitable interest which it and its citizens have in the properties subject to the paramount jurisdiction and control of the Federal Government. It is met by the claim that, as a result of Public Law 31, the Federal Government no longer has paramount jurisdiction and control over the properties but that the exclusive property interest in the lands and resources is in the defendant states. The Act of Congress here under attack, Public Law 31, is not in issue because of any contention that it is the basis on which the Federal Government asserts jurisdiction and control. Public Law 31 is under attack because it is the *sole* basis on which the defendant states assert exclusive property interests in the lands and resources here involved, to the exclusion of the interest of Alabama and its citizens which is derived

[17] See paragraph 6 of Alabama's prayer for relief.

[18] See paragraph 4, of Alabama's prayer for relief.

from the paramount jurisdiction and control of the Federal Government.

The defendant states make the additional argument, in effect, that the United States is an indispensable party because they claim their property interests through grant from the United States.[19] However, this argument overlooks the fact that Alabama is not attacking the paramount jurisdiction and control of the Federal Government and is seeking no affirmative relief from the Federal Government. Therefore the case falls within the rule that in a suit against a grantee to try property rights, the grantor is not only not an indispensable party, but is not even a proper party. *Laidly* v. *Huntington*, 121 U.S. 179 (1887). The various defendants attempt to bolster this argument by pointing out that the validity of an Act of Congress is in issue. As Texas puts it, it is urged that the suit involves "a challenge to the authority of the United States".[20] This is an argument which strikes at the whole foundation of judicial review and flies in the face of the doctrines enunciated by this Court in *Marbury* v. *Madison*, 1 Cranch 137 (1803), and *Ex parte Young*, 209 U.S. 123 (1908).

In fact, the very nature of Alabama's claim, that Public Law 31 is unconstitutional and that action taken under color of it is therefore null and void, is one of the primary reasons why it is clear that this suit is not a suit against the Government. This Court recently had occasion to review the precedents on the

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[19] Objections of Texas, p. 19; Objections of California and Florida, p. 34.

[20] Objections of Texas, p. 18; Objections of California and Florida, p. 34.

issue of sovereign immunity in the case of *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). After so doing it announced its adherence to the rule that:

> ". . . the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." (337 U.S. at 701-702.)

Notwithstanding this clear indication of the attitude of the Court, the individual defendants characterize the prayer for relief as "an attempt to interfere with official conduct in the management of governmental property",[21] and cite numerous cases to support this characterization, and the claim which they make based upon it, that the Government must be impleaded. The indiscriminate reliance by the individual defendants on a number of cases in an attempt to sustain this vague proposition, necessitates a brief analysis of the principal cases and the reasons why they are not applicable to the case at bar.

In *Belknap* v. *Schild*, 161 U.S. 10 (1896), the bill prayed for an injunction against continued use of a patented caisson gate, and for its destruction. The caisson gate was naval property of the United States, used by the United States as part of a dry dock in a U.S. Navy Yard. The Court said:

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[21] Opposition of Defendants Humphrey, et al., p. 36.

> "Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in the property of which the United States had both the title and possession; . . ." (161 U.S. at 25.)

In the case at bar no comparable relief is proposed. Alabama makes no effort to reach, destroy, or compel conveyance or restrict the use by the Government of any property of the United States. Alabama is asserting no interest adverse to the United States. *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902), is even more inapposite because its holding results directly from an Act of Congress establishing a special interest of the United States in the subject matter of the suit. That case involved a suit by the State of Minnesota against the Secretary of the Interior claiming title to some lands held by the United States and administered by the Secretary of the Interior as an Indian Reservation. A Federal statute specifically authorized the suit but the statute was attacked as unconstitutional. The Court upheld the statute as being within the judicial power of the United States as that power is defined in Article III of the Constitution. The individual defendants' opposition omits to mention either the existence of this Act or its effect on the holding. That holding is misrepresented if the statute is ignored.

Nagaab v. *Hitchcock*, 202 U.S. 473 (1906), is one of the cases which the individual defendants say are "indistinguishable in principle from the one at bar".[23] Yet in a respect vital to the ground of decision the case is not only distinguishable, but is actually opposed to the position taken by the individual defendants. Suit was brought in that case, not to prevent the repudiation of a trust, but to litigate the manner in which the trust should be performed. The relief prayed for was that the Secretary of the Interior "be required to execute the trust in favor of the Indians, and account to the complainant as required by the act of January 14, 1889, . . ." (202 U.S. at 475.) Affirmative action, necessarily that of the Government, was the proposed relief. In contrast, Alabama asks, not that the Government do something, but that the defendant states cease their assertions of authority and exclusive property rights, and that the defendant individuals be forbidden to turn over control of the natural resources to the defendant states.[24] Although defendants Humphrey, *et al.* portray this prayer as requiring that the individual defendants actively oppose the claims of the defendant states,[24] all that Alabama wants is that the individuals be forbidden to take affirmative steps to perfect the control sought by the defendant states over the property. With respect to the escrow funds Alabama similarly seeks only total passivity of the individuals. The interest of Alabama in the funds may be entirely preserved without any affirmative act

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[23] Opposition of Defendants Humphrey, et al., p. 35.

[24] This is the acquiescence sought to be restrained by paragraph 6 of the prayer for relief.

[24] Opposition of Defendants Humphrey, et al., Fn. 12, p. 36.

of the individual defendants named in the Complaint. In fact, Alabama recognizes that these defendants could take no affirmative action to pay funds over to Alabama without further action by Congress. All that is asked now is that the funds should not be dissipated.

It is on *Morrison* v. *Work*, 266 U.S. 481 (1925), that the individual defendants place their principal reliance.[25] They say, "In principle, the case at bar is in no way distinguishable from the *Morrison* case, and the holding must be the same."[26] It is, however, distinguishable on the fundamental ground that Morrison brought suit *to regulate the manner in which the trust was performed* by the Government. The United States was performing the trust along the lines fixed by later statutes. Morrison sued to enjoin this mode of execution of the trust on the ground that the later statutes were unconstitutional, and the inevitable result of injunctive relief asked would have been to require performance according to the earlier statutory scheme. The Court said through Justice Brandeis:

> "Each Complaint relates to some change made either in the method of managing and disposing of the ceded lands or in the disposition of the proceeds thereof." (266 U.S. at 485.)

In the case at bar Alabama does not attempt to prescribe how the trust shall operate. The claim is that the trust has been *repudiated* by action proposed to be taken by the individual defendants. Defendants can point to no place in Alabama's Complaint or Brief at which any assertion is made of the proper

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[25] Opposition of Defendants Humphrey, et al., pp. 38-41.

[26] Id., p. 41.

mode of trust administration. Alabama asserts only that the individual defendants, in acting to repudiate the trust, act under no valid authority. With respect both to the accrued rents and royalties and the natural resources, no action of the four individual defendants is sought, and none is necessary. The sovereign, therefore, is not implicated. *Ickes* v. *Fox*, 300 U.S. 82 (1937).

The Opposition of Defendants Humphrey, *et al.* makes an effort to distinguish *Land* v. *Dollar*, 330 U.S. 731 (1947), from the case at bar by quoting from the opinion of the Court the statement that the situation with which the Court was dealing in that case was not one:

> " . . . where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress.'"[27] (330 U.S. at 737-738)

Alabama's interest in the funds and resources does not arise under an Act of Congress but, in the terms of the Complaint, from constitutional rights. The equity of Alabama is not claimed to be adverse or superior to any interest of the United States. Alabama has alleged an interest which is similar to that in all the states, and adverse only to the exclusive interest claimed by defendant states.

Distinctions borrowed from *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), are set forth at length by the individual defendants, and the situation at bar is characterized to fit.[28] A full review

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[27] Opposition of Defendants Humphrey, et al., quoted p. 35.

[28] Opposition of Defendants Humphrey, et al., pp. 33-34, 36.

of the law on this point, however, is available from the majority opinion by Chief Justice Vinson and in the dissent of Justice Frankfurter. As the late Chief Justice states the law, the general rule is that the suit is not directed against the sovereign when "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." 337 U.S. 690. The exception to this is when relief requested "cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign properly", [citing *North Carolina* v. *Temple*, 134 U.S. 22 (1890)].[20] 337 U.S. 691, fn. 11. In this statement he is in complete accord with Justice Frankfurter, who states, in his dissent:

> "The matter boils down to this. The federal courts are not barred from adjudicating a claim against a governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged. Sovereign immunity may, however, become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental

[20] North Carolina v. Temple does not, as Justice Frankfurter points out in his dissenting opinion, qualify the principle of the cases relied upon by Alabama:

> "Regard for the facts of these cases brings them within the first category because the nature of the relief requested makes them either cases in which Government property would have to be transferred, or cases where the persons sued could satisfy the court decree only by acting in an official capacity. . . ." 337 U.S. 713.

> machinery into play. The Government then becomes an indispensable party and without its consent cannot be implicated. . . ." (337 U.S. at 715.)

Thus both are agreed that a suit such as the case at bar does not implicate the sovereign unless the complainant seeks a disposition or transfer of sovereign property or requires acts that only the sovereign can do.

Alabama is not seeking a conveyance of Government property or money. It is seeking that property subject to the paramount jurisdiction and control of the Federal Government and money derived from such property *not* be turned over to Texas, California, Louisiana and Florida.

Alabama does not pray that any use of public property by Government officials for public benefit be regulated or altered. It prays that Government officials *not* take steps which will make any such use impossible.

Alabama does not pray for any affirmative act on the part of Government officers. The action threatened by the individual defendants will be an affirmative series of acts turning funds over to three defendant states and the actual releasing of control to the four defendant states of the natural resources involved in this proceeding. Alabama asks this action *not* be taken.

Alabama urges that in this case the proper way to determine against whom relief will operate, and whether validity of authority is in issue, is from the allegations and prayers contained in the Complaint. While Alabama does not believe it is necessary in this case to postpone determination of the questions of whether the United States is an indispensable party until consideration of the merits, Alabama is not averse

to proceeding in that fashion. In any case, it could not *now* be decided that the Government is an indispensable party, thus causing leave to file the Complaint to be denied. Normally, the absence of authority of the defendants, and presence of injury on the part of the plaintiff must, if alleged, be assumed at this stage of the case. No reason is apparent or alleged by defendants why any departure from the normal rule is necessary here. *Ickes* v. *Fox*, 300 U.S. 82, 96 (1937).

CONCLUSION

Wherefore, it is respectfully submitted that motion for leave to file this complaint be granted and that, upon hearing, the relief prayed for in the complaint be granted.

Respectfully submitted,

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